

MONTANA PUBLIC DEFENDER COMMISSION

Holiday Inn, Great Falls MT

October 24, 2011

Draft Minutes

Commissioners Present

Margaret Novak, Chester; Charles Petaja, Helena; Richard (Fritz) Gillespie, Helena; William Snell, Billings; Ann Sherwood, Pablo; Christopher Daem, Billings; Alfred Avignone, Bozeman

Commissioners Absent

Terry Jessee, Billings; Majel Russell, Billings; Caroline Fleming, Miles City; Kenneth Olson, Great Falls

Staff Members Present

David Stenerson, Interim Chief Public Defender; Joslyn Hunt, Chief Appellate Defender; Kristina Neal, Conflict Coordinator; Larry Murphy, Contracts Manager; Eric Olson, Training Coordinator; Harry Freebourn, Administrative Director; Peter Ohman, Regional Deputy Public Defender (RDPD), Bozeman; David Duke, RDPD, Billings; John Putikka, RDPD, Kalispell; Dan Minnis, RDPD, Havre; Jon Moog, RDPD, Helena; Matt McKittrick, RDPD, Great Falls; Marsha Parr, Case Management Support Specialist; Cathy Doyle, Administrative Assistant

Liaisons

Nick Aemisegger, liaison for union attorneys, and Lisa Korchinski, liaison for non-management appellate defender staff and attorneys, were in attendance. Laura Masica, liaison for union support staff and investigators, had nothing to report and did not attend.

Interested Persons

Timm Twardoski, Executive Director, American Federation of State, County and Municipal Employees (AFSCME); Scott Crichton, Executive Director, American Civil Liberties Union of Montana (ACLU); Nikki Zupanich, Public Policy Director, ACLU; Emily Chang, Consultant, ACLU; Ron Waterman, Consultant, ACLU; David Niss, Legislative Services Division; Melody Brown, Assistant Public Defender, Great Falls; Vince van der Hagen, Assistant Public Defender, Great Falls; Hon. Julie Macek, District Court Judge, 8th Judicial District

1. Call to Order

The Montana Public Defender Commission meeting was called to order by Chairman Fritz Gillespie at 8:37 a.m. Chairman Gillespie welcomed three new commissioners, Ann Sherwood, Chris Daem, and Al Avignone.

2. Approval of Minutes of August 29 and September 29, 2011 Meetings (*Action Item)

Commissioner Olson noted a typographical error on page 5 of the August 29 meeting minutes. The minutes were approved as corrected by acclamation. The minutes of the September 29 meeting were approved as submitted by acclamation.

3. Commission Liaisons

Lisa Korchinski, liaison for non-management appellate defender staff and attorneys, and Laura Masica, liaison for support staff and investigators, had nothing to report. Chairman Gillespie invited

attorney liaison Nick Aemisegger to make his report. In addition, he offered the Great Falls staff attorneys and Judge Macek 15 minutes each to state their case regarding substitution of judges.

Mr. Aemisegger asked for the opportunity to review and comment on the Commission's final response to the American University report before it is issued. He then yielded the floor to Great Falls staff attorney Vince van der Hagen.

Mr. Van Der Hagen objected to the substitution of judges policy that has been implemented in the Great Falls office. He considers it to be management interference in the independent judgment of attorneys to best represent their clients. He does not concede that the Chief Public Defender or the Commission have the legal authority to say that he cannot engage in blanket substitutions. He said that the statute regarding substitution does not require good cause, but only requires that the motion be filed within a certain time frame.

Great Falls staff attorney Melody Brown agreed with Mr. van der Hagen's objection to management telling attorneys how to run a case.

Judge Macek said that substitution is the right of the client, not the attorney, and she supported the OPD policy that was implemented in Great Falls requiring attorneys to notify their clients that they intend to substitute. She said that the blanket substitution of judges was having a negative impact on the judiciary in Cascade County, as well as impugning the reputation of the targeted judge. She noted that the private bar has never substituted this judge. Despite the implementation of the policy, which only says that attorneys must follow the law and their ethical requirements as attorneys, substitutions continue to be rampant. She asked the Commission to uphold the current policy. Otherwise, her judges will go to the legislature or the Supreme Court to resolve the issue.

Following questions from the Commission, Chairman Gillespie instructed Interim Chief Public Defender Dave Stenerson to work with Mr. Aemisegger and Regional Deputy Matthew McKittrick to straighten this out within two weeks. He reminded them that as officers of the court, attorneys have an obligation to the court as well as to the client for the administration of justice.

4. Collective Bargaining Update

Commissioner Petaja reported that negotiations will continue in early November. The focus is on caseloads and funding the pay matrix for attorneys.

Timm Twardoski, AFSCME Executive Director, was asked to discuss the freeze on health insurance costs and the pending lawsuit against the legislature. He said that the scheduled insurance premium increase was frozen for both employees and retirees, but it is being paid out of the insurance reserves, not the general fund, so there may be consequences down the road. A state hearings officer recommended that the lawsuit be dismissed, but the unions appealed the decision and a state Board of Personnel Appeals hearing is scheduled for December 15. They have not yet had a response from the Governor regarding the demand to bargain.

Mr. Twardoski believes that the situation for staff attorneys has reached crisis mode; attorneys are working hours they are not reporting and there is competition between regions for resources. The agency needs to find and provide adequate resources to allow people to do their jobs.

5. Appellate Defender Program Report

Chief Appellate Defender Joslyn Hunt continues to see an upward trend in case numbers, including more postconviction relief appointments, which last a long time and will affect her budget. She is recruiting again following the loss of another attorney. The salary differential is a large factor in the staff turnover she is experiencing; there are many higher paying opportunities for attorneys in Helena.

Chief Hunt recently met with Chief Justice McGrath regarding “case dumping.” Her office has seen more appointments following the trial phase, including eight last month. Chief Justice McGrath said that they endorse limited scope representation, so she expects to continue to see more of this in the future.

6. Conflict Coordinator Report

Conflict Coordinator Kristina Neal’s report was deferred until later in the meeting, to be given in conjunction with proposed policy changes (Item 10. E.)

7. ACLU Visits to OPD Regions

The ACLU conducted site visits throughout the state and issued a report evaluating the statewide public defender system five years after inception. Chairman Gillespie said that there have been mixed reactions to the report, but he wanted to remind everyone how much the ACLU has invested in this agency, which exists because of their efforts. He hopes to use the report in a positive way to collect the necessary information to present to the Governor, Legislature and Chief Justice to help remedy the problems.

ACLU Montana Executive Director Scott Crichton introduced Public Policy Director Nikki Zupanic and Helena attorney Ron Waterman, who was the ACLU’s lead counsel in the litigation that created the Office of the State Public Defender (OPD). Mr. Waterman said that what they hoped to provide in the report is a tool to use in the next session. He has a great deal of pride in the agency as it was eventually developed; it has a much broader role than originally anticipated. He believes it is critical to continue to work together to improve the system.

Emily Chang, an associate professor at the University of Utah, was introduced. Ms. Chang was one of the attorneys who worked on the original lawsuit, and she was heartened by the changes she saw upon her return to Montana to participate in the recent site visits.

Ms. Chang gave highlights of the findings documented in the report: failure to collect key data, poor resource management, and a lack of empowerment for the regional offices. She encouraged the Commission to help build trust between OPD management and staff, and to empower local offices in return for accountability not only to clients, but also in data collection and other areas related to the “bigger” issues that the Commission is responsible for. Ms. Chang invited questions and comments from the Commission.

There was a lengthy discussion of the various issues raised in the report, including the relationship between data collection and use of resources; case weighting (“workload”) and actual caseload counts; the need for active mentoring; management, supervision and training; mental health pre-approvals; staffing and uniformity between offices. Chairman Gillespie wants to see uniformity in management while allowing for individuality in leadership.

In response to the questions and comments from the Commission, Ms. Chang offered to pass along resources available at the national level. She noted that there is continued interest in Montana's system; it is innovative and people want to know how it is playing out. It would be a devastating loss for services across the country if OPD were to fail. She encouraged the Commission to hire a new chief with management experience with a large agency. In regards to recoupment programs, other states have them too, but in general they are penny wise and pound foolish. It generally costs more to collect than what you receive, and collections can also impact other state agencies because clients may need more assistance in other areas (e.g. food stamps).

Commissioner Snell said he has been on the Commission longer than any other member, and he has seen amazing accomplishments since the American University report was issued. A lot of progress has been made with limited resources. And, despite an initial bias against the ACLU, he now sees them as a valuable partner in improving the system.

8. Public Comment

Chairman Gillespie invited public comment on the ACLU report.

Eric Olson commented as a Montana citizen, not as OPD staff. He believes strongly in the ACLU, but took exception to page 10 of the report regarding investigator training. He detailed the dozens of presenters who have provided training to OPD staff over the years, at no cost to the agency. He also wanted to point out that former Chief Public Defender Randi Hood's leadership brought the agency to this point, and as a result many good things are being done every day by investigators, managers and attorneys.

Chairman Gillespie said that it is important that the Commission make a reply to the ACLU report to demonstrate in an affirmative way the items that might be somewhat inaccurate.

Mr. Waterman commented on the lack of adequate funding. In the original settlement, the ACLU did reserve the right to come back with further litigation if there were inadequacies in the system related to funding. The legislature rejected the ACLU's best estimate of what the statewide system would cost, and they proceeded with the understanding that there would be supplemental appropriations through the first biennium if needed. Despite the continued underfunding, however, the ACLU cannot go back to the lawsuit until OPD has their house in order—they must be able to demonstrate that the problems are only about funding, and not other areas of deficiency.

9. Public Defender Program Report

A. Chief Public Defender Report

Chief Hood made a final written report to the Commission. Chairman Gillespie said that case dumping will continue to be an issue, but that it is within the authority of the judiciary not of the Commission. However, the Commission may wish to consider making an advisory statement.

Chief Stenerson thanked Chief Hood for her hard work in putting the system together. He has been spending a lot of time learning the ropes in the past month – budgets, legislative process, daily duties – and it is a monumental task.

Chief Stenerson sees the ACLU report as positive; although he may not agree with the way everything was said, the basic issues raised are legitimate. He will be looking for ways to increase the number of paralegals in the system, and there is a new attorney orientation

program that will be conducted by video with oversight from the local manager. The intent is to keep making improvements with the limited resources available.

Chairman Gillespie noted that Chief Stenerson's report mentioned the possibility of creating a Chief Civil Deputy position, and asked what he thought about the idea of a Deputy Chief? Chief Stenerson said that if he had to choose he believes that the Chief Civil Deputy would serve the agency better.

The Commission unanimously thanked Chief Hood for her service. Chairman Gillespie said that for all of the criticism that she received, the strides made over the agency's five years of existence were due to her efforts.

B. Legislative and Budget Update (Interim Activity)

Administrative Director Harry Freebourn expects that the ACLU report will be on the agenda of the December Law and Justice Interim Committee (LJIC) meeting. The LJIC, chaired by Senator Shockley, will want potential agency legislation at their June meeting.

Reports were submitted to the Legislative Finance Committee, chaired by Representative Sesso, at their September meeting. They will be looking at OPD caseloads to see what kind of pressure the system is under. They will also meet next in December.

The budget process for the 2015 biennium will begin at the next Commission meeting, with time for revisions before the budget is submitted to the Governor in May, 2012.

C. Financial and Operating Report

Mr. Freebourn focused on the accompanying graphs, beginning with FTE by function. Additional employees are need in Kalispell, Billings, Helena and the Central Office. The Central Office is being reconfigured into a "central services" role to support Programs 1 and 2 as well as the conflict coordinator function.

The detailed budgeting process is almost complete. There is an increase in personal services due to the eight new FTE approved during the last session (they did not work a full year in FY 11). There will also be increased costs for longevity increases and separation payouts. Rent and technology increases will also be substantial this year. OPD is a general fund agency, with a very small state special revenue account, part of which will be used to fund the Commission's staff.

New cases represented by the bubble graphs on pages 4-6 show every location that the agency serves, either by FTE or contractors. Although the number of new cases has grown little over the last couple of years, there is considerable growth in the base, with the carryover from the prior year. Projections are for higher growth again this year. The net case report is a snapshot of any given day. The average number of days open report shows that cases are being turned over in a timely way compared to speedy trial guidelines.

The next two graphs show assessments and collections. A receivable is created when the assessment is made. Although OPD does not send clients who don't pay to collections or add interest, there is an incentive to pay because the client is subject to revocation for non-payment. Changes made during the last session require the clerks of court to collect the

payments and then disburse them to OPD, and OPD must account for the payments. At the end of the first quarter of FY 12, OPD has not yet received any payments from the courts.

The net number of appellate cases per year continues to grow. The case weights by attorney type show some of the pressures the system is experiencing.

Mr. Freebourn distributed sample closed case summary reports, created to provide dispositional information. He asked the Commission to let him know what kind of report they would like to see based on the form.

D. FY 2012 Operating Budget

Regional and departmental budgets for FY 12 and 13 are being finalized. Each office was given five years of trending information as well as case weighting information and actual expenditures to use in developing their budgets. The goal is to ensure that each office is employing resources as effectively as possible.

Chairman Gillespie asked the RDPDs to introduce themselves for the benefit of the new Commission members, and asked them each to comment on the stresses their regions are experiencing. The common theme was lack of money leading to employee turnover, higher caseloads, and difficulty in attracting contract attorneys. Only the RDPD in Bozeman said they have done well up until now because they have had the appropriate number of staff. However, they will be losing an FTE attorney to a region with more pressing needs and he may begin to experience the same problems other under-resourced regions have had. In Billings, a new county attorney and filing old cases have added to their caseloads. In Great Falls, there has been a marked increase in DN cases over the last six months in response to child homicides in the area. The loss of contract attorneys in Libby has increased pressure on the Kalispell office due to the increased windshield time, and they would like to establish an office there staffed with FTEs. The vast distances in the Havre region also create a lot of windshield time. They have a limited number of contractors, two of whom just passed the bar, and a brand new FTE attorney; the RDPD there is taking care not to overwork them.

Chairman Gillespie said that it would be helpful to the Commission for the regional deputies to identify what exactly they need to make their offices run smoothly and functionally. It would demonstrate that each region has unique needs.

E. Contracts (SB 153 Amend 41-3-425)

Contract Manager Larry Murphy reviewed his written report. He has become very familiar with the Standards as he works on the compliance interviews. Section VI. A. b. requires that public defenders complete 20 hours of continuing legal education each calendar year relating to public defender practice. This requirement has never been enforced by the Commission or OPD because of resistance from contract attorneys, particularly in eastern Montana. In addition, it is in excess of the State Bar's annual requirement of 15 CLE credits per year. Mr. Murphy does require contractors to provide their annual CLE affidavits so that he can monitor the type of training they are pursuing, but it is an area of the Standards the Commission might want to reevaluate.

There was a significant change to the DN statute as a result of SB 153, giving the court discretion to appoint a public defender for a guardian ad litem (GAL). Mr. Murphy said that the GAL is an

agent of the court, not a party in the action, and so representing them is outside of OPD's mission. It could result in a significant increase in costs for DN cases.

Training Coordinator Eric Olson said that Standards do need to be adopted for representation of children in DN cases, and a team has been working on developing them for a year. One problem is that there is no agreement at a national level on what the standards should be. Some issues to be addressed are children involved in both DN and juvenile offender cases, and protecting the rights of pre-verbal children. The ABA Standards say that all kids should have an attorney, pre-verbal or not, but there could be pushback on that in Montana. This new Montana statute is confusing and is not being applied uniformly by the courts. Chairman Gillespie believes that legislative action is needed to clarify inconsistency in the statutes.

F. Training Report

Mr. Olson discussed the ongoing management leadership training that was originally implemented before the agency start up. The existing management problems are not for want of trying to solve them. He brought a binder representing the continuity in leadership training covering an array of topics including the importance of staff meetings, managing caseloads, when to contact human resources, union involvement, etc. The fifth leadership training is scheduled for December.

Mr. Olson responded to Ms. Chang's repeated remarks on accountability and a comment that some attorneys didn't know how to write a motion. All OPD attorneys went to law school and passed the bar. In addition, there is an orientation program, a computer based Standards verification program, and a brief bank with sample motions. If it is true that people aren't trained despite these efforts, then the deficiencies need to be identified and corrected.

Chairman Gillespie plans to incorporate Mr. Olson's comments into his response to the ACLU report, which he intends to have for the December LJIC meeting. It is not strictly about training, but has to do with the new hire just out of law school, and the overwhelming number of cases they are expected to assume when hired. They need supervision and mentoring from their managers. The agency must make the case to the governor and the legislature to relieve the stress from the lawyers. Mr. Olson said all of these problems can be solved with money. However, if you do more with less, then you get less, and there is a point at which you must define what the limit is.

Commissioner Petaja agreed that a response should be made to the statement in the ACLU report that the training program is "a joke." He was also troubled by the lack of comparison to other states. He has a report from Washington State that shows misdemeanor attorney caseloads are 400-800 per year, and Montana's highest was 260. Commissioner Novak was perturbed that the report included so much anecdotal information and wonders how the Commission can respond without knowing the source? Chairman Gillespie will work with the ACLU staff to get more information.

10. Old Business/New Business

*A. FY 2011 Governor's Report (*Action Item)*

The draft FY 2011 Report to the Governor, Supreme Court and Legislature was presented to the Commission. The expenditure data is not yet complete, and Chairman Gillespie is updating the assessment piece. Commissioner Daem moved to authorize Chairman Gillespie to release the

report on behalf of the Commission when it is complete. Commissioner Novak seconded and the motion carried.

B. Appoint Screening and Initial Interview Teams

Chairman Gillespie reviewed the steps in the recruitment process for the chief public defender. He asked the members to let him know how they would like to be involved in each step of the process.

C. Committee Membership

The new members were asked to consider which of the standing committees they would like to serve on and let Chairman Gillespie know by November 1. Ongoing commissioners are welcome to express interest in serving on other committees as well. In addition to the standing committees, three new “teams” have been established to work with staff teams on specific topics: treatment courts, revision of the strategic plan, and eligibility/cost recovery.

*D. Proposed Standards Revisions (Delivery of Services) (*Action Item)*

This item was tabled. It needs to be considered in relation to the cost recovery project.

*E. Proposed Revisions to Policies 116 and 119 (*Action Item)*

Conflict Coordinator Kristina Neal invited questions on her written report. She is working hard to keep her hours in the half-time range, and unless she is traveling she is doing pretty well. However, the number of conflict cases continues to increase and the position is moving toward a full-time FTE, or at least the addition of a half-time support staff. There is not only an increase in the number of cases, but also limited availability of contractors to take them. She is working with the regional deputies to address the problem.

Ms. Neal has two policy revisions for the Commission’s review and approval. The changes to Policy 116 reflect the creation of the conflict coordinator position and the Commission’s oversight of the position. Commissioner Novak moved to approve the changes; Commissioner Daem seconded and the motion carried.

The revisions to Policy 119, determining conflicts of interest, also reflect the creation of the conflict coordinator office and strengthen the language regarding determining conflicts and getting them quickly out of the regional offices. Commissioner Snell moved to adopt the changes; Commissioner Novak seconded. Chairman Gillespie asked if the regional deputies were having any problems with Ms. Neal making the appointments instead of making their own appointments. The new process is a bit of an adjustment, and there seems to be a lag in the time it takes to make an appointment, but it is just a matter of getting used to a new process. Ms. Neal said that once it really is going, it should take some work off of the regional person instead of being an extra step. The motion carried.

F. Strategic Plan Review and Revision (Progress Notes)

The strategic plan dates back to the inception of the agency. Commissioner Olson is leading the team to update it.

G. Eligibility Determination and Cost Recovery (Progress Notes)

This team has started work, beginning with input from the agency IQ specialist.

H. Specialty Courts (Progress Notes)

Commissioners Snell and Daem are working on this issue. In Billings, there are five drug courts and each one runs differently. Some of them are federally funded, but if they are not they can change their standards at will. Commissioner Snell recommended two resources available online, "Critical Issues for Defense Attorneys in Drug Court" and "The Drug Court Judicial Benchbook," both from the National Drug Court Institute.

Commissioner Petaja asked if the Commission will revisit the issue of representation in post-sentence DUI courts, which they previously decided was outside the agency's mission. It is not clear if this decision has been implemented. One problem with specialty courts is that the court wants one defender to represent all participants, some of whom do not qualify for public defender services.

I. Set future Commission meeting dates

The next meeting will be scheduled for late January, to coincide with the recruitment and selection schedule. In the interim, the teams will provide progress reports. Mr. Freebourn noted that committee or team meetings should be public even if no action is planned.

11. Public Comment

There was no additional public comment.

12. Adjourn

Commissioner Petaja moved to adjourn, Commissioner Daem seconded and the motion carried. The meeting adjourned at 4:50 p.m.